Supreme Court, U. S.
FILED
SEP 26 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

NO. 77-____ 77-477

JOE S. HOPPER, WARDEN,
GEORGIA STATE PRISON,

Petitioner,

v.

TYRONE BARNETT,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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TYRONE BARNETT,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

The petitioner, Joe S. Hopper, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on March 10, 1977, rehearing en banc denied on June 27, 1977.

OPINIONS BELOW

The opinion of the Fifth Circuit Court of Appeals is reported at 548 F. 2d 550 (5th Cir. 1977). A copy of the opinion is attached hereto as Appendix A.

The opinion of the District Court for the Southern District of Georgia is unreported; a copy of the opinion appears herein as Appendix B.

JURISIDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on March 10, 1977. A timely petition for rehearing and rehearing en banc was denied on June 27, 1977. See 555 F. 2d 1391. This petition for certiorari is taken within ninety days of that date. 28 U.S.C. § 2101(c). The Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1.

For purposes of equal protection analysis is wealth always a suspect classification simply because the issue arises in the context of the criminal justice system?

2.

Although there may be some uncertainty as to whether a defendant has the ability to pay a fine (and it subsequently appears that he cannot pay the fine because of indigency), does the Equal Protection Clause of the Fourteenth Amendment preclude the imposition of a probated sentence conditioned upon the payment of a fine based upon factors which include assessments as to the ability of the defendant to successfully serve a term of probation if a fine is paid first?

CONSTITUTIONAL PROVISIONS INVOLVED

UNITED STATES CONSTITUTION, ART. 14, SEC. 1:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATUTORY PROVISIONS INVOLVED

GA. CODE ANN. § 27-2529 (1972 REV.):

In any case where the judge may, by any law so authorizing, place on probation any person convicted of a felony, such judge may in his discretion fine such person so convicted not more than $2,000 as a condition to such probation: Provided, such defendant shall not be entitled to any rebate or refund of any part of such fine so paid, in any case such probation shall be revoked by law.

GA. CODE ANN. § 27-2709 (1972 REV.):

* * * *

If it appears to [the] court upon a hearing of the matter that the defendant is not likely to engage in a criminal course of conduct and that the ends of justice and the welfare of society do not require that the defendant shall presently suffer the penalty imposed by law, the court in its discretion shall impose sentence upon such defendant but may stay and suspend the execution of such sentence or any portion thereof, and may place him upon probation under the supervision and control of the circuit probation supervisor for the duration of such probation.

* * * *

The court may, in its discretion, require the payment of a fine or cost or both as a condition precedent to probation.

STATEMENT OF THE CASE

In 1973, the respondent, Tyrone Barnett, and a codefendant were charged with armed robbery in the Superior Court of Liberty County, Georgia. Pursuant to plea negotiations with retained counsel, the district attorney recommended to the trial court that, upon pleas of guilty, a ten year probated sentence conditioned on the payment of a $2,000 fine be imposed on each defendant.

Barnett and his codefendant represented that the fines would be paid and contacted their respective families. The pleas were entered and Barnett was sentenced in accordance with the recommendation.

The codefendant received the same sentence. His fine was paid and he was released to probation. For some unexplained reason, the funds that Barnett thought would be forthcoming were not. His fine was not paid and he began serving the ten year sentence.[1]

Barnett unsuccessfully sought habeas corpus relief in the state courts. Barnett v. Hopper, 234 Ga. 692, 217 S.E. 2d 280 (1975); see also, Barnett v. State, 231 Ga. 741, 204 S.E. 2d 296 (1974).

---

[1] During the pendency of the case in the lower federal courts, Barnett was paroled.

The federal district court also denied relief in an unreported opinion. See Appendix B. The Fifth Circuit Court of Appeals reversed on the basis that "imprison[ing] an indigent when in the same circumstances an individual of financial means . . . remain[s] free constitutes a denial of equal protection of the laws." Barnett v. Hopper, 548 F. 2d 550, 554 (5th Cir. 1977). Rehearing en banc was denied on June 27, 1977, after a poll of the court. 555 F. 2d 1391.

REASONS FOR GRANTING THE WRIT

I. THE PETITION PRESENTS AN IMPORTANT QUESTION CONCERNING THE EXTENT TO WHICH THE EQUAL PROTECTION ANALYSIS OF RECENT DECISIONS SUCH AS MAHER V. ROE, ___ U.S. ___ (1977), SHOULD APPLY IN CASES WHERE THE EQUAL PROTECTION ISSUE ARISES IN THE CRIMINAL JUSTICE SYSTEM.

As recognized in Maher v. Roe, ___ U.S. ___, 97 S. Ct. 2376 (1977), financial need in and of itself has never been sufficient to create a suspect class for purposes of traditional equal protection analysis. It was inferred, however, that equal protection issues arising in the context of the criminal justice system are perhaps analyzed differently. Id. at ___ n. 6, 97 S. Ct. at 2381.

The rationale of Maher on the "suspect class" issue was that all manner of state action, through a vast body of statutes and regulations, may sometimes impose greater hardships on the poor than on the rich. Maher, of course, relied on San Antonio School District v. Rodriguez, 411 U.S. 1 (1973), and Dandridge v. Williams, 397 U.S. 471 (1970).

The petitioner suggests that the fact that an equal protection issue arises in the criminal justice system is no basis upon which to utilize a different type of analysis. Whatever the "state action" -- health, education, taxation, public safety (including the criminal justice system), et al. -- the truism of Maher is present.

If the same type of equal protection analysis should be utilized in cases arising in the criminal justice system, perhaps Griffin v. Illinois, 351 U.S. 12 (1956), Douglas v. California, 372 U.S. 353 (1963), and similar cases can be read as requiring the state regulation or statute to pass the test of strict judicial scrutiny (or compelling interest test) and not the lesser test of only rationally furthering a legitimate state purpose. Griffin and Douglas can be read as employing the stricter test because in large measure a meaningful first stage appeal determines if the panoply of constitutional rights enjoyed by the defendant has been afforded him; a meaningful appeal thus at least indirectly promotes the implementation of basic constitutional rights. Cf. Ross v. Moffitt, 417 U.S. 600, 611-612 (1974).

In the case sub judice, however, apart from the equal protection issue, no other constitutional rights are implicated in the plea of guilty to the charge of armed robbery. For instance, it has never been suggested that the plea of guilty was involuntary or that counsel was ineffective. The petitioner therefore suggests that the application of Ga. Code Ann. § 27-2529 (1972 Rev.) need only rationally further a legitimate state purpose.[2]

The decision of the Court of Appeals is really devoid of analysis in terms of the equal protection issue. The panel simply concluded that wealth was a suspect classification and went no further. This case would be an appropriate one in which to test that bald conclusion in the context of a case arising in the criminal justice system.

---

[2] Whether the application of § 27-2529 in this case rationally furthers a legitimate state interest and why that issue should merit certiorari review is discussed infra.

II. THE ABILITY OF A DEFENDANT TO PAY A FINE IS OFTENTIMES A CRITICAL FACTOR IN THE DECISION OF A TRIAL JUDGE IN DETERMINING WHETHER THE DEFENDANT IS LIKELY TO SUCCESSFULLY SERVE A TERM OF PROBATION.

Of concern to the Court in Tate v. Short, 401 U.S. 395 (1971), Morris v. Schoonfield, 399 U.S. 508 (1970) and Williams v. Illinois, 399 U.S. 235 (1970) was the absence of the furtherance of any valid penal objective by the state statute in question that converted a fine into a term of imprisonment for failure to pay the fine. Tate v. Short, supra, 401 U.S. at 399; Williams v. Illinois, supra, 399 U.S. at 242. Probation, as opposed to a fine that only raises revenue, does further the penal objectives of a state. The probationer is maintained under close supervision until it is deemed that he can become a constructive member of society without such supervision.

Probation is an integral tool in the rehabilitation of the convicted felon. Of course, many factors are present in determining whether the convicted felon should be released on probation or parole. The decision to place the convicted felon on probation is therefore not one to be entered into lightly, especially if the defendant has been convicted of a serious crime such as armed robbery. It is unquestioned that the trial judge is vested with a wide discretion in sentencing matters in order that an appropriate punishment can be molded to fit "the countless variety of situations that appear." Williams v. Illinois, supra, 399 U.S. at 243.

Viewed from the perspective of the state trial judge at the time of sentencing in this case, the sentence which resulted was quite reasonable, as well as appropriate to the circumstances of the particular case and the individual involved. Of critical significance is that the sentence imposed and the sentence challenged here was based on an unqualified representation that a fine could be paid by the person seeking probation. It would be impossible at this point in time to reconstruct each of the considerations which entered into the judge's decision to place Barnett on probation on the condition that he pay a fine, but the fact that he assured the sentencing court that he could pay the fine had to be one of them.

Before a sentencing judge makes a decision to probate a sentence, he must determine whether the particular defendant is a good probation risk. Specifically, the judge must decide that the individual defendant is not likely to engage in a continuing course of criminal conduct and that the ends of justice and the welfare of society do not require that the defendant presently suffer the penalty imposed by law. It was the state judge's determination in this case, on the basis of the representation made to him, that Barnett would be a good probation risk should he first pay the fine that was imposed.

The fine aspect of the judgment simply does not place Barnett in a position where he is suffering disparate treatment based solely on wealth. On the issue of probation, the fine and ability to pay the fine provided assurances to the trial judge that the probation would be successful. A trial judge, upon receiving a representation that a family member would be willing and able to pay the fine, knows that added control over the sentence is provided by the interest of the family and the belief of the family that the defendant can successfully serve the period of probation.

Further, the payment of a fine places upon a given probationer a greater responsibility in successfully serving the period of probation than not paying a fine or paying a fine over the entire period of the sentence. In Georgia, if a breach of probation occurs, the fine money is lost and the only credit the defendant receives is that for the time spent on probation. Ga. Code Ann. § 27-2529, (1972 Rev.). Succinctly, the fine feature of the probation sentence does not result in disparate treatment on the basis of wealth, but on acceptable considerations stemming from the fact that an accused has assured the sentencing court that he can and will pay a fine. As noted, a commitment by a trial court to impose a probated sentence in a serious crime such as armed robbery must always be a close and difficult question; if a defendant's willingness to pay a fine is a factor which provides the court added assurance that the individual is a good risk for probation, the subsequent or later developed fact that the individual cannot pay the fine materially alters the original considerations which went into the judgment.

In such a case the judgment has already been made for the defendant -- if the fine cannot be paid, he must serve his time within the confines of the penitentiary.

Ga. Code Ann. §§ 27-2529, 27-2709 (1972 Rev.) on their face obviously foster a legitimate state purpose -- the rehabilitation of offenders outside the confines of a penitentiary. For the reasons noted above, in some instances the ability of the defendant to pay a fine can be an important factor in assessing his ability to complete a term of probation. The imposition of a fine thus furthers the rehabilitative purpose. Stated in another, somewhat hypothetical fashion, a wealthy defendant may be a bad probation risk because of other factors, but the fact that he is wealthy and can pay a fine should be an indicator that he will not return to a life of crime out of economic necessity. The same cannot necessarily be said of the indigent defendant -- he may be a good probation risk for other reasons, but his lack of family financial support or unemployment (and consequent inability to pay a fine) is some indication that he might return to crime out of necessity. Generally it is only the close case where the ability to pay a fine will be the determinative factor but in those cases the decision to impose a lump sum fine[3] cannot be said to be invidious discrimination.

---

[3]As noted above, in Georgia the fear of losing the entire sum upon revocation adds a greater measure of control than installment payments.

The indigent defendant may sometimes feel ensnared in a Catch-22 poverty cycle, but simply because the cycle is regretable and unfortunate does not necessarily mean that the defendant has suffered an equal protection violation.

The facts here go far beyond the "$30.00 or 30 days" factual context of the cases where the raising of revenue was the overriding state interest. Cf. Tate v. Short, supra; Morris v. Schoonfield, supra; Williams v. Illinois, supra. For this reason, and as trial judges across the nation face the same difficult problems as the trial judge in this case, the petitioner submits the case is worthy of certiorari review.

CONCLUSION

For the above and foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the Fifth Circuit Court of Appeals.

Respectfully submitted,

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APPENDIX "A"

Tyrone F. BARNETT,
Petitioner-Appellant,

v.

Joseph S. HOPPER, Warden,
Respondent-Appellee.

No. 76-3230
Summary Calendar.*

United States Court of Appeals,
Fifth Circuit.

March 10, 1977.

Georgia prisoner sought habeas corpus relief from allegedly unconstitutional sentence. The United States District Court for the Southern District of Georgia, Anthony A. Alaimo, Chief Judge, denied relief, and petitioner appealed. The Court of Appeals, Clark, Circuit Judge, held that although penalty imposed, i. e., ten-year probated sentence conditioned on payment of fine, was the same as that recommended by prosecutor in plea bargaining agreement the guilty plea did not waive any constitutional attack on imposition of active prison sentence when anticipated funds for immediate payment of the fine were not forthcoming, that to imprison an indigent when in the same circumstances an individual of financial means would remain free constitutes a denial of equal protection, that sentence imposed was unconstitutional and sentence was to be reformed to eliminate the wealth-indigency factor or defendant, seeking to have requirement of immediate payment modified to permit reasonable installment payments, was to be allowed to replead.

Reversed and remanded with directions.

1. Criminal Law ⇐273.4(1)
Fines ⇐11

Guilty plea did not constitute waiver of Georgia defendant's right to raise constitutional consequences which flowed from his inability to pay fine imposed as condition of probated sentence, specifically, defendant should have been permitted to make reasonable installment payments and should not have been imprisoned when he could not immediately pay fine, notwithstanding that a probated sentence conditioned on payment of fine was part of plea bargain. Code Ga. §§ 27-2529, 27-2709; U.S.C.A.Const. Amend. 14.

2. Criminal Law ⇐273.4(1)

While a guilty plea, and any plea bargain which underlays it, constitutes a break in the chain of events which has preceded it and operates as a waiver of defects occurring before the plea was entered, it does not waive any constitutional attack on a subsequent sentence merely because the sentence accords with the plea agreement. U.S.C.A.Const. Amend. 14.

3. Criminal Law ⇐273.1(2)

A plea bargain is not a sentence contract but is merely an agreement by a defendant to plead guilty in exchange for a suggestion by the prosecutor that the judge impose a certain sentence; even if the recommendation is followed there still does not arise the type of quid pro quo that is present in the guilty plea itself and its waiver of previous constitutional violations.

* Rule 18, 5 Cir.; *see Isbell Enterprises, Inc. v. Citizens Casualty Co. of New York et al.*, 5 Cir. 1970, 431 F.2d 409, Part I.

JUL 7 1977
Betty W. Hack

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4. Criminal Law ⇐1208(2)

Trial judges have broad discretion in fixing punishment.

5. Constitutional Law ⇐250.3(1)

To imprison an indigent when in the same circumstances an individual of financial means would remain free constitutes a denial of equal protection. U.S. C.A.Const. Amend. 14.

6. Constitutional Law ⇐270
Criminal Law ⇐982.6(4)

Although sentence imposed on Georgia defendant, i. e., ten-year probated sentence conditioned on payment of fine, was the same as that recommended by prosecutor in connection with plea bargain, it was a violation of due process to sentence defendant to ten years' imprisonment when anticipated funds for immediate payment of fine were not forthcoming; defendant, seeking modification of immediate payment requirement to provide for reasonable installment payments, was entitled to have sentence reformed so as to eliminate the wealth-indigency factor or defendant was to be allowed to replead. Code Ga. §§ 27-2529, 27-2709; U.S.C.A.Const. Amend. 14.

Appeal from the United States District Court for the Southern District of Georgia.

Before GOLDBERG, CLARK and FAY, Circuit Judges.

CLARK, Circuit Judge:

Petitioner Tyrone Barnett seeks habeas corpus relief from his May 1973 Georgia state conviction for armed robbery. After Georgia courts denied him the relief sought, so did the United States District Court for the Southern District of Georgia. Finding Barnett's claim for relief to be meritorious, we reverse.

Barnett and a codefendant were charged in 1973 with armed robbery. Their retained attorney reached an agreement with the prosecutor that in exchange for their guilty pleas, the prosecutor would recommend that the court impose a ten-year probated sentence conditioned on the payment of a $2,000 fine and court costs by each defendant. The statutory basis for the sentence is Ga. Code Ann. § 27-2709 (1972), which states "[t]he court may, in its discretion, require the payment of a fine or costs or both as a condition precedent to probation." Section 27-2529 establishes $2000 as the maximum permissible fine. Prior to the plea, arrangements were made by the defendants with their families for the payment of the fines. Each entered a guilty plea; the codefendant paid his fine and received probation. For some reason which the record before us does not explain, the funds Barnett anticipated would be available could not be raised. When this occurred he was sentenced to ten years' imprisonment.

[1-3] Barnett now contends that this sentence, which concededly was in accord with his agreement, should not have been conditioned upon an immediate payment of the bargained-for fine. He seeks to have the requirement of immediate payment modified to permit a reasonable installment payment schedule. Since the trial judge was accepting a plea bargained between the prosecutor and the defendants in imposing this sentence, the State argues that any possible impropriety has been waived.

We cannot agree that Barnett's plea constitutes a waiver of his right to raise the constitutional consequences which flowed from his subsequent inability to pay. In *Brady v. United States*, 397 U.S. 742, 90 S.Ct. 1463, 25 L.Ed.2d 747

(1970); *McMann v. Richardson*, 397 U.S. 759, 90 S.Ct. 1441, 25 L.Ed.2d 763 (1970); and *Parker v. North Carolina*, 397 U.S. 790, 90 S.Ct. 1458, 25 L.Ed.2d 785 (1970), the Supreme Court dealt with the effect of a plea of guilty on a subsequent attack on claimed violations of constitutional rights. *Tollett v. Henderson*, 411 U.S. 258, 267, 93 S.Ct. 1602, 1608, 36 L.Ed.2d 235 (1973), summarized the conclusions of the *Brady* trilogy thus:

> When a criminal defendant has solemnly admitted in open court that he is in fact guilty of the offense with which he is charged, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred *prior* to the entry of the guilty plea. [Emphasis supplied]

As the *Tollett* court added, "[t]he focus of federal habeas inquiry is the nature of the advice [given by an attorney] and the voluntariness of the plea, not the existence as such of an *antecedent* constitutional infirmity." 411 U.S. at 266, 93 S.Ct. at 1608 (emphasis supplied). Our decisions have similarly limited waiver to defects occurring before the guilty plea was entered. *Broxson v. Wainwright*, 477 F.2d 397 (5th Cir. 1973); *Traber v. United States*, 466 F.2d 483 (5th Cir.), *cert. denied*, 409 U.S. 1044, 93 S.Ct. 542, 34 L.Ed.2d 495 (1972); *Waddy v. Davis*, 445 F.2d 1 (5th Cir. 1971). The constitutional violation which Barnett urges was the imposition of an improper sentence because of changed circumstances occurring *after* the guilty plea. *See Lefkowitz v. Newsome*, 420 U.S. 283, 288, 95 S.Ct. 886, 889, 43 L.Ed.2d 196 (1975). While the guilty plea, and any plea bargain which underlay it, constitutes a "break in the chain of events which has preceded it," *Tollett v. Henderson, supra* at 267, 93 S.Ct. at 1608, it does not waive any constitutional attack upon a subsequent sentence merely because that sentence accords with the defendant's agreement.

The district judge held that the doctrine of *volenti non fit injuria* applied. The thrust of this position is that since Barnett agreed to the imposition of the sentence, he may not rue back the bargain. Though there is merit to the argument as an abstract principle, it loses its force when applied to produce constitutionally impermissible confinement. Moreover, the plea bargain is not a sentence contract. It is expressly limited to an agreement by the defendant to plead guilty in exchange for a *suggestion* by the prosecutor that the judge impose a certain sentence. Even if the recommendation is often or usually followed, there still does not arise the type of *quid pro quo* that is present in the guilty plea itself and its waiver of previous constitutional violations. The trial court had to make an affirmative, independent decision to impose the sentence that was the result of plea bargaining. He also decided to permit the allegedly unconstitutional imprisonment to take place when Barnett's inability to pay a fine later arose. The court's choice to impose and enforce the sentence recommended is not so intimately a part of Barnett's plea bargain as to remove it from constitutional inspection. The question of the propriety of the sentence is properly before this court.

It is uncontroverted on this record that Barnett believed his fine would be paid. We expressly pretermit any ruling on the legitimacy of a sentence of imprisonment that is imposed upon a defendant who affirmatively agrees to incarceration in lieu of payment of a fine. If a strict adherence to contract law principles would indicate that Barnett

should be bound to imprisonment in the event impecuniousness prevented his financial performance, such a contractual approach still could not be squared with the constitutional doctrine established by the *Williams-Morris-Tate* line of decisions. Barnett's agreement to this unconstitutional condition was predicated on his mistaken belief the fine would be paid, thus it is clearly distinguishable from the case of a defendant who explicitly agrees to a recommended period of imprisonment in exchange for a plea.

[4] We note at the outset of our consideration of the merits that the State is correct in arguing that, on their facts, the Supreme Court precedents are distinguishable from the present situation. In *Williams v. Illinois*, 399 U.S. 235, 90 S.Ct. 2018, 26 L.Ed.2d 586 (1970), the Court held that an individual unable to pay a fine could not constitutionally be incarcerated beyond the maximum duration fixed by statute. The Illinois defendant had been sentenced to the maximum confinement and then required to remain 101 days further to satisfy at $5 per day his $505 fine and court costs. On the same day, the Court in *Morris v. Schoonfield*, 399 U.S. 508, 509, 90 S.Ct. 2232, 2233, 26 L.Ed.2d 773 (1970) (concurring memorandum opinion), vacated a conviction and remanded it for reconsideration in light of *Williams v. Illinois*. Justice White, with three other justices concurring, opined that an indigent could not be imprisoned for failure to pay a fine immediately, regardless of whether this resulted in incarceration for a term longer than the maximum permitted under statute. This was based on the view that the constitution forbade converting a fine into a sentence due to immediate financial inability to pay. The next term in *Tate v. Short*, 401 U.S. 395, 91 S.Ct. 668, 28 L.Ed.2d 130 (1971), the Court adopted the language from the *Morris* concurrence stating the broad proposition that imprisonment for failure to pay a fine immediately is improper. As the State here points out, however, *Tate* dealt with a conviction in a Texas court empowered to impose only fines. If a defendant could not pay the fine, it was converted into a prison sentence. The court further stated:

> Imprisonment in such a case is not imposed to further any penal objective of the State. It is imposed to augment the State's revenues but obviously does not serve that purpose; the defendant cannot pay because he is indigent and his imprisonment, rather than aiding collection of the revenue, saddles the State with the cost of feeding and housing him for the period of his imprisonment.

Id. at 399, 91 S.Ct. at 671. Admitting the broad discretion granted trial judges in fixing punishment, the *Tate* court stated that once the determination is made that imprisonment is unnecessary and a fine would suffice, imprisonment could not then be imposed for inability to pay that fine. Finally the court stated that other methods, payment by installment being the only one specifically noted, *id.* at 400 n. 5, 91 S.Ct. at 671 n. 5, have been utilized and were constitutionally permissible. In *Williams v. Illinois*, the Court also referred to satisfaction of the fine by work performed after a probationer/parolee has been released from incarceration. 399 U.S. at 244 n. 21, 90 S.Ct. at 2024 n. 21. As the Supreme Court indicated in *Williams v. Illinois, id.* at 244–245, 90 S.Ct. at 2024:

> The State is free to choose from among the variety of solutions already proposed and, of course, it may devise new ones. [Footnote omitted.]

[5] This court has not interpreted the *Williams-Morris-Tate* line of cases to be limited to their precise facts. When a defendant is imprisoned for financial inability to pay a fine immediately, he is treated more severely than a person capable of paying a fine immediately. The sole distinction is one of wealth, and therefore the procedure is invalid. *Frazier v. Jordan*, 457 F.2d 726 (5th Cir. 1972). Though *Frazier* was based on the proposition that wealth is a "suspect classification" and such a conclusion has since been drawn into question by such authority as *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1, 29, 93 S.Ct. 1278, 1294, 36 L.Ed.2d 16 (1973) (plurality opinion of four justices), the basic principles remain sound. To imprison an indigent when in the same circumstances an individual of financial means would remain free constitutes a denial of equal protection of the laws. *See also Burton v. Goodlett*, 480 F.2d 983 (5th Cir. 1973).

As did the *Frazier* decision, we too abstain from drawing into question the imprisonment of a defendant who, though capable of paying a fine, refuses or neglects to do so. As the Court further stated:

> "Nor is our decision to be understood as precluding imprisonment as an enforcement method when alternative means are unsuccessful despite the defendant's reasonable efforts to satisfy the fines by those means; the determination of the constitutionality of imprisonment in that circumstance must await the presentation of a concrete case." *Tate v. Short*, 401 U.S. at 400–401, 91 S.Ct. at 672, 28 L.Ed.2d at 134–135.

457 F.2d at 730.

[6] The sentence imposed was unconstitutional. The order of the district court denying habeas relief is reversed and the cause is remanded with directions to issue the writ unless within 30 days after the receipt of the mandate in the District Court the sentence is reformed in a manner not inconsistent with this opinion or the petitioner is allowed to replead.

REVERSED AND REMANDED WITH DIRECTIONS.

A true copy
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By: Clare F. Sachse
New Orleans, La. JUL 5 1977

Adm. Office, U.S. Courts—West Publishing Company, Saint Paul, Minn.

APPENDIX "B"

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
SAVANNAH DIVISION

TYRONE F. BARNETT,	*	
	*	CIVIL ACTION
v.	*	
	*	NO. 475-236
JOSEPH S. HOPPER, WARDEN	*	

O R D E R

This 2254 petition brought in forma pauperis shows that Barnett, as part of a negotiated plea bargain knowingly and voluntarily accepted by him, was sentenced to ten years imprisonment, to be probated on his payment of a $2,000 fine. He now contends that since he is an indigent, such a condition violates his constitutional right to equal protection of the law. The answer to his complaint is quite simple. There is an ancient maxim: "Volenti non fit injuria." The conclusion is inescapable that Barnett waived any constitutional right, not simply by pleading guilty, but by entering into the negotiated plea bargain. In substance, his complaint is not that the plea bargain was breached, but that it was honored.

Accordingly, the complaint is ordered dismissed.

So Ordered, this 9th day of July, 1976.

/s/ Anthony A. Alaimo
United States
District Judge

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM

NO. 77-____

JOE S. HOPPER, WARDEN,
GEORGIA STATE PRISON,

Petitioner,

v.

TYRONE BARNETT,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

CERTIFICATE OF SERVICE

I, B. Dean Grindle, Jr., Attorney of Record for the Petitioner herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that in accordance with the Rules of the Supreme Court of the United States, I served three copies of the foregoing Petition for A Writ of Certiorari upon the Respondent by depositing same in a United States mailbox,

with first class postage prepaid, addressed to counsel of record as follows:

Mr. James C. Bonner, Jr., Esq.
University of Georgia
School of Law
409 North Lumpkin Street
Athens, Georgia 30601

This 26th day of September, 1977.

B. DEAN GRINDLE, JR.

RECEIVED
JAN 18 1978
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE SUPREME COURT

OF THE UNITED STATES

JOSEPH HOPPER, WARDEN,

PETITIONER

v.

NO. 77-477

TYRONE BARNETT,

RESPONDENT

RESPONSE TO PETITION

FOR A WRIT OF CERTIORARI

TO THE FIFTH CIRCUIT COURT OF APPEALS

James C. Bonner, Jr.
Counsel for the Respondent
Prisoner Legal Counseling Project
University of Georgia School of Law
475 North Lumpkin Street
Athens, Georgia 30601
(404.542-4241)

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IN THE SUPREME COURT

OF THE UNITED STATES

JOSEPH HOPPER, WARDEN,

PETITIONER

VS. NO. 77-477

TYRONE BARNETT,

RESPONDENT

RESPONSE TO PETITION

FOR A WRIT OF CERTIORARI

A. Counter-Statement of the Question Presented

Whether, once a state judge has determined that an appropriate punishment for a particular offender in a particular case does not require his incarceration, the State has the power, despite the Equal Protection Clause of the 14th Amendment, to exclude him from probation and to confine him for his involuntary inability to pre-pay in lump sum a fine imposed as a condition precedent to probation.

B. Further Statement of the Case

Relying upon their families' assurances that they would supply the necessary funds, the Respondent and his co-defendant entered negotiated guilty pleas to charges of armed robbery in the Liberty (Georgia) Superior Court). The Court sentenced each to ten years but provided that the sentences could be served on probation upon the pre-payment of $2,000 fines. (Appendix 1 is a copy of the Respondent's sentence.)

The co-defendant's family came through for him and paid his fine. He was released shortly after sentencing. For reasons never disclosed, however, the Respondent's family reneged on the promise that they had made to the Respondent and his attorney. When it became apparent that they would not forward the money, the Respondent timely moved the trial court to modify his sentence to permit him to pay his fine off in instalments as a condition of probation. His motion was never entertained on the merits. See Barnett v. State, 231 Ga. 741, 204 S.E.2d 296 (1974).

He then unsuccessfully sought a state writ of habeas corpus before a different judge, challenging his confinement as a violation of his right to the equal protection of the laws, Barnett v. Hopper, 234 Ga. 694, 217 S.E.2d 280 (1975). (App. ii-iii is a copy of the order in the lower state court.) Thereafter he sought the federal writ, 28 U.S.C. 2254. The District Court denied relief, not on the merits, but upon the basis (never urged by the State) that he had waived any equal protection claim "by entering into the negotiated plea bargain" (App. iv).-1)

The Fifth Circuit Court of Appeals reversed, finding (a) no waiver of the equal protection claim and (b) a violation of equal protection "to imprison an indigent when in the same circumstances an individual of financial means would remain free," Barnett v. Hopper, 548 F.2d 550 at 554 (5th Cir. 1977).

The State then applied to this Court for a writ of certiorari to review (b), the merits. While its application was pending, the

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-1) In none of these proceedings was there any finding that the Respondent had ever intentionally misrepresented his circumstances to the trial judge. The record of the state habeas hearing demonstates clearly that both he and his counsel relied in good faith upon the assurances of his family.

Supreme Court of Georgia rendered an opinion in Hunter v. Dean, ___ Ga. ___, ___ S.E.2d ___ (No. 32401, 28 Nov. 1977) (copy attached as App. v-xiv), rejecting the Fifth Circuit's reasoning in Barnett, adhering to its previous positions on the point, and, for the first time, outlining its reasoning.-2)

C. Why This Court Should Not Disturb the Judgment Below

Whatever the constitutional propriety of financial distinctions may be in a civil context, see Harper v. Virginia State Board of Elections, 383 U.S. 663 (1966), Dandridge v. Williams, 397 U.S. 471 (1970), San Antonio School District v. Rodriguez, 411 U.S. 1 (1973), Maher v. Roe, ___ U.S. ___ (1977), this Court has made it clear that fundamentally different considerations abound in the context of the criminal law, Griffin v. Illinois, 351 U.S. 12 (1956), Burns v. Ohio, 362 U.S. 252 (1959), Lane v. Brown, 372 U.S. 477 (1963). See Maher v. Roe, supra at ___, n. 6. There this Court has characterized it as "the central aim of our entire judicial system [that] all people charged with crime must, so far as the law is concerned, 'stand on an equality before the bar of justice in every American court.' * * * In criminal trials a state can no more discriminate on account of poverty than on account of religion, race, or color," Griffin v. Illinois, supra at 19 (citation omitted). "There can be no equal justice," this Court concluded, "where the kind of trial a man gets depends on the amount of money he has," id. at 19.

-2) A petition for a writ of certiorari will shortly be filed in Hunter v. Dean. See Rule 19 of this Court.

Also, this Court should not be unaware that the Respondent has been paroled from his sentence. Unresolved issues of possible mootness thus lurk in this case, cf. North Carolina v. Rice, 404 U.S. 244 (1971). They are not present, however, in Hunter because a District Court released her on recognizance pendente lite so that she could afford the State Supreme Court to reconsider in view of the mounting authority in the local District Courts.

Griffin and the cases which followed it generally dealt with financial barriers to effective access to procedures which the States had established for criminal trials and reviews, e.g., Smith v. Bennett, 365 U.S. 708 (1961), Douglas v. California, 372 U.S. 353 (1963), Rinaldi v. Yeager, 384 U.S. 305 (1966). See Ross v. Moffitt, 417 U.S. 600 at 606 (1974). This case and its companion, Hunter v. Dean, supra (App. v), present the closely related question of whether the States, having provided a system of probation as ameliorative punishment for selected criminals, can bar one solemnly adjudged qualified from effective access to its benefits solely because he is an indigent and unable to pre-pay an assessed fine. To focus the issue under Griffin, it is essentially a question of whether equal justice exists "where the kind of [punishment] a man gets depends on the amount of money he has." It is a question which, in different circumstances, this Court has answered before, though apparently not clearly enough. See Williams v. Illinois, 397 U.S. 235 (1970), Morris v. Schoonfield, 399 U.S. 508 (1970), Tate v. Short, 401 U.S. 395 (1971).

Setting appropriate, individualized punishments is an integral part of the criminal justice system. Trial judges have been vested with a wide sentencing discretion allowing them to take account of an infinite variety of circumstances, Williams v. New York, 337 U.S. 241 (1949). But neither the width of the discretion nor the complexities of exercising it is any reason why the ancient pledge of the Magna Carta, "To *no* man will we sell . . . right or justice," and the modern promise of equal justice of the 14th Amendment should not extend to issues of punishment in a given case, as is part of the position of the State of Georgia. See Petition, p. 12, Hunter v. Dean at App. x. Neither is a good excuse not to scrutinize the application of sentencing discretion to create invidious classes of prospective probationers based on impermissible considerations, cf. Yick Wo v. Hopkins, 118 U.S. 356 (1886). There are, after all, limits to that discretion, see Townsend v. Burke, 334 U.S. 736 (1948), North Carolina v. Pearce, 395 U.S. 711 (1969), Proffitt v. Florida, ___ U.S. ___ (1976). And certainly among them is the

Equal Protection Clause of the 14th Amendment, Tate v. Short, supra.

Nonetheless, it is the adamant position of the State of Georgia that the ability to pre-pay a fine is a legitimate consideration for probation eligibility and that it may therefore explicitly approve one type of punishment for the rich and a harsher type for the equally culpable and otherwise equally situated poor. Such a wealth discrimination is permissible, in her view, essentially because it arguably serves a legitimate interest in the context of predicting success on probation. -3) See Petition, p. 14, Hunter v. Dean at App. ix-x.

But the State's argument proves too much. Just as an indigent probationer might be tempted by his poverty to commit other crimes (despite presumably being "under close supervision until it is deemed that he can become a constructive member of society," Hunter v. Dean at App. ix, Petition, p. 11), probation may not at all deter his wealthy counterpart who has only had his knuckles, protectively thrust into his deep pockets, lightly (for him) rapped. Just as a family's payment of a fine might arguably reflect added control over the probationer through its interest and confidence in him, Hunter v. Dean, App. at xi, it might as easily suggest that someone lucky enough to be born into a wealthy (or indulgent) family will not be stung at all by the sentence. And in contrast to an indigent probationer, who may not commence probation with a paid-in "stake" in succeeding, Hunter v. Dean at App. xii, Petition, p. 13, but who would have a definite interest in working responsibly in order to

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-3) Probably much the same argument might be made of other human characteristics. To some minds, political persuasion, religion, race, or national origin might be important indicators, but they are no less forbidden considerations. See, e.g., Griffin v. Illinois, supra at 15.

maintain his payments, his wealthier counterpart, flushed with the power of his money or the influence of his family, may not be motivated to do anything, including changing his errant habits.

In short, ecomonic status is at best an ambiguous consideration. From the same faulty premise that wealth is relevant to sentencing can arise an equally cogent (and equally fallacious) argument that it is the wealthy defendant who ought to be incarcerated and the poor one permitted to pay a fine. -4)

In any event, more than just a "legitimate" State interest in the discrimination is necessary in order to sustain it. Since in the context of the criminal law wealth is clearly a "suspect" classification, Griffin v. Illinois, supra, Georgia "must show that its purpose or interest is both constitutionally permissible and substantial, and that its use of the classification is 'necesgary to the accomplishment' of its purpose or the safeguarding of its interest," In re Griffiths, 413 U.S. 717 at 722 (1973) (citation omitted).

Moreover, the classification in effect created in the Respondent's case affects a recognized "fundamental right," his conditional liberty as a probation, Morrisey v. Brewer, 408 U.S. 471 (1972). Approaching the matter from that direction, Georgia is obliged to

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-4) The State has suggested that the Respondent's position "would result in inverse discrimination as to defendants under an identical sentence who were financially able to pay the fine immediately," Hunter v. Dean at App. viii. Considering that the Respondent does not wish to avoid the fine but merely to have a fair opportunity to pay it in a reasonable alternative fashion (such as this Court has already implicitly approved, Tate v. Short, supra at 400, n. 5), any difference between a lump sum payment and a series of instalments is a de minimis discrimination at best. The Respondent seeks only the same option open to his wealthy counterpart: to pay a fine and escape imprisonment. See In re Antazo, 473 P.2d 999 (Calif. 1971).

demonstrate that its interest in disqualifying indigent defendants from probation is a compelling one, Shapiro v. Thompson, 394 U.S. 618 (1969), Williams v. Rhodes, 393 U.S. 23 (1968).

Georgia simply has not done either. She has yet to show why the Respondent (or Ms. Hunter) should suffer imprisonment "solely because [he] is indigent and cannot pay the fine in full," Morris v. Schoonfield, supra at 509, Tate v. Short, supra at 398, and why he should not be allowed to pay the fine off during the probation that he was adjudged worthy of.

D. Conclusion

To imprison an indigent when in the same circumstances a person of means would remain free constitutes a denial of the equal protection of the law. Whether the confinement results from a fine being directly converted into imprisonment or from a fine imposed as a condition precedent to probation, the fundamental result is the same: the defendant involuntarily unable to pay is "subjected to imprisonment solely because of his indigency."

The trial court has determined that the Respondent need not be confined for his crime and that the State's penal interests would be met by a fine and probation. This is an individualized sentence and the Respondent certainly has no quarrel with the court's essential judgment. But he does take issue with the mode of payment which has been required and which has effectively, irrationally, unnecessarily, and impermissibly barred him from the benefits which the court adjudged him worthy of.

The State must accomodate his indigency and permit him the same escape from confinement open to a defendant of means under the same sentence: to pay a fine and serve his sentence on probation. It cannot offer probation only to those who can pay for it.

Whether a person can pay a fine immediately has no apparent relationship to punishment or to rehabilitation. It serves no State interest not served equally well or better by permitting instalment payments.

The judgment of the Court of Appeals was correct and should not be disturbed.

James C. Bonner, Jr.
Counsel for the Respondent

CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of January, 1978, I mailed first-class a copy of the foregoing response to the counsel for the Petitioner, Assistant Attorney General Dean Grindle, 132 State Judicial Building, 40 Capitol Square, SW., Atlanta, Georgia 30334.

James C. Bonner, Jr.
Counsel for the Respondent

Prisoner Legal Counseling Project
University of Georgia School of Law
475 North Lumpkin Street
Athens, Georgia 30601
(404/542-4241)

SENTENCE 12 Jan.

Charge Armed Robbery

Liberty Superior Court

Feb. Term, 1923

No. 1576

THE STATE : (PLEA) (~~VERDICT~~) OF GUILTY

vs. :

Dyrone J Barnett :

:

WHEREUPON, It is ordered and adjudged by the Court that the Defendant, Dyrone J Barnett be taken from the Bar of this Court to the Jail of Liberty County, and be there safely kept until a sufficient guard is sent for him from the Georgia Penitentiary, and be then delivered to, and be by such guard taken to said Penitentiary, or to such other place as the Directory of Corrections may direct, where he, the said defendant, be confined at labor for the full term of 10 years years, to be computed according to law. 10 yrs Probated upon Payment of Fine & Costs as indicated Cost

Defendant has been advised concerning the consequence of an escape during the service of this sentence. Jail time has been taken into consideration by the Court in this sentence. The defendant was represented in this case by Libby & Mayfield Attorney.

In Open Court, this 4 day of May, 1923

Judge, Superior Court, Atlantic Judicial Circuit of Georgia

District Attorney, Atlantic Judicial Circuit of Georgia

GEORGIA Liberty COUNTY.

I, the undersigned (Deputy) (Clerk) of the Superior Court, in and for said County, do hereby certify that the above is a true and complete copy of the sentence and judgement of the Court in the Case of State vs. Dyrone J Barnett convicted of Armed Robbery as appears of record and from the minutes of said Court.

Given under my official signature and the seal of said Court, this 21 day of May, 1923

Journal Print—Reidsville, Ga.

(Clerk) (Deputy Clerk)

N.P. 1

IN THE SUPERIOR COURT OF TATTNALL COUNTY

STATE OF GEORGIA

TYRONE F. BARNETT, Petitioner	)	
-vs-	)	HABEAS CORPUS
JOESEPH S. HOPPER, Warden Georgia State Prison, Respondent	)	CIVIL ACTION NO. 74-72

ORDER

The above styled case was heard on May 2, 1974 in the Tattnall County Courthouse by order of this Court. After consideration of the Petition, hearing credible testimony and observing documentary evidence, this Court finds as follows:

FINDINGS OF FACT

The Petitioner, Tyrone F. Barnett, is confined in the Georgia State Prison, Reidsville, Georgia by virtue of a sentence of ten years probated upon payment of fine of two thousand ($2,000.00) dollars. The above sentence was imposed as a result of Petitioner's plea of guilty to armed robbery on May 4, 1973 in the Liberty County Superior Court.

The Petitioner filed his petition in forma pauperis and was represented at his Habeas Corpus evidentiary hearing by Attorney James C. Bonner, Jr., of the Prisoner Legal Counseling Project, University of Georgia School of Law. The Petitioner alleges that his sentence of "ten years probated upon payment of fine of two thousand ($2,000.00) dollars" deprives him of his constitutional rights because he is an indigent and was forced to serve time in prison because he cannot pay the fine. Petitioner states that this is a violation of the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution.

Filed in Office
This 2nd day of July 1975
Lucie W. Rowland
Clerk
Deputy

App. ii

The above allegation was argued on behalf of Petitioner and others (related cases) before the Liberty County Superior Court on a motion for sentence modification on September 7, 1973. The Liberty Superior Court denied the motion and that decision was affirmed on appeal to the Georgia Court of Appeals on March 14, 1974. State vs. Judy D. Neal, Case No. 48858.

This Habeas Corpus Court finds that it is well settled that "in any case where the judge may...place on probation any person convicted of a felony, such judge may in his discretion fine such person so convicted not more than $2,000.00 as a condition to such probation." See Ga. Code Ann., Section 27-2529.

This Habeas Corpus Court further finds that Petitioner's sentence complied with the provisions of Section 27-2529, and was therefore a valid probationary sentence. Also, the Georgia Court of Appeals has upheld the validity of the above Section 27-2529. See Payne vs. The State, 117 Ga. App. 92, 93.

FINDINGS OF LAW

I therefore find that none of Petitioner's constitutional rights have been violated and that he is serving a legal sentence.

It is therefore CONSIDERED, ORDERED, and ADJUDGED that the Petitioner be remanded to the custody of the Honorable Joe S. Hopper, Warden, Georgia State Prison, Reidsville, Georgia.

The costs of this proceeding are taxed against the Respondent.

This 18th day of February, 1975.

DAN S. COWART, JUDGE
State Court of Tattnall County, Georgia
PRO HAC VICE Judge of Superior Court
Tattnall County, Georgia

I, Susie W. Rowland Deputy, Clerk of the Superior Court in and for said County, do hereby certify that the within and foregoing contains a true and correct copy of the Final Order of Judge J. Brown T. Brown (ret) Ga. J. Hopper, Warden, Case #E-24-75 as appears from the records in this office.

Given under my hand and seal this the 20th day of February 1975.

Susie W. Rowland - Deputy

Southern District of Ga.
Filed in office
3:50 P. M.
July 9 1976
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
SAVANNAH DIVISION

TYRONE F. BARNETT	*	CIVIL ACTION
VS.	*	NO. 475-236
JOSEPH S. HOPPER, Warden	*	

O R D E R

This 2254 petition brought in forma pauperis shows that Barnett, as part of a negotiated plea bargain knowingly and voluntarily accepted by him, was sentenced to ten years imprisonment, to be probated on his payment of a $2,000 fine. He now contends that since he is an indigent, such a condition violates his constitutional right to equal protection of the law. The answer to his complaint is quite simple. There is an ancient maxim: "Volenti non fit injuria." The conclusion in inescapable that Barnett waived any constitutional right, not simply by pleading guilty, but by entering into the negotiated plea bargain. In substance, his complaint is not that the plea bargain was breached, but that it was honored.

Accordingly, the complaint is ordered dismissed.

So Ordered, this 9th day of July, 1976.

United States District Judge

APP IV

528

In the Supreme Court of Georgia.

Decided: NOV 28 1977

32401. HUNTER v. DEAN, Sheriff, et al.

MARSHALL, Justice.

This appeal is from the denial of a petition for writ of habeas corpus by the Superior Court of Terrell County. The appeal was granted to consider whether the probation of a jail sentence may constitutionally be conditioned upon the payment of a fine in a lump sum when the defendant is indigent and unable to make immediate payment of the fine. We affirm the trial court.

Petitioner, Jacquelyn Hunter, and a co-defendant both pled guilty to burglary and were sentenced to two years in the penitentiary. The sentence was to be probated upon payment of a fine of $165. The co-defendant paid the fine and his sentence was probated. Petitioner was unable to pay the entire amount in a lump sum. She was incarcerated.

Petitioner argues that a trilogy of Supreme Court cases -- Tate v. Short, 401 U. S. 395 (91 SC 668, 28 LE2d 130) (1971); Morris v. Schoonfield, 399 U. S. 508 (90 SC 2232, 26 LE2d 773)

App. V

(1970); and Williams v. Illinois, 399 U. S. 235 (90 SC 2018, 26 LE2d 586) (1970) -- mandates the conclusion that it is unconstitutional to subject a defendant to imprisonment solely because the defendant is financially unable to pay a fine immediately in a lump sum. The petitioner points out that this view was adopted by the United States Court of Appeals for the Fifth Circuit in Barnett v. Hopper, 548 F2d 550 (5th Cir. 1977), in granting habeas relief previously denied by this court in Barnett v. Hopper, 234 Ga. 694 (217 SE2d 280) (1975). Consequently, we are asked to reexamine our holdings in Calhoun v. Couch, 232 Ga. 467 (207 SE2d 455) (1974), and Barnett v. Hopper, supra.

In Calhoun v. Couch, 232 Ga. 467, supra, and Barnett v. Hopper, 234 Ga. 694, supra, this court rejected arguments by defendants that their conditionally probated sentences made their imprisonment (resulting from an inability to pay the fine) a denial of equal protection under the Fourteenth Amendment of the United States Constitution. The court found several United States Supreme Court cases -- Williams v. Illinois, supra; Morris v. Schoonfield, supra; and Tate v. Short, supra -- distinguishable from a conditionally probated sentence imposed pursuant to Code Ann. § 27-2709 (Ga. L. 1956, pp. 27, 31; as amended).

App. vi

Relevant to the petitioner's citing of Barnett v. Hopper, 548 F2d 550, supra, it is obvious that Barnett v. Hopper misinterprets the U. S. Supreme Court's opinions and should not be applied here. This case is controlled by Williams v. Illinois, 399 U. S. 235, 243 (SC ; LE2d) (1970) where it is stated, "It bears emphasis that our holding does not deal with a judgment of confinement for nonpayment of a fine in the familiar pattern of alternative sentence of '$30 or 30 days.' We hold only that a State may not constitutionally imprison beyond the maximum duration fixed by statute a defendant who is financially unable to pay a fine. A statute permitting a sentence of both imprisonment and fine cannot be parlayed into a longer term of imprisonment than is fixed by the statute since to do so would be to accomplish indirectly as to an indigent that which cannot be done directly. We have no occasion to reach the question whether a State is precluded in any other circumstances from holding an indigent accountable for a fine by use of a penal sanction. We hold only that the Equal Protection Clause of the Fourteenth Amendment requires that the statutory ceiling placed on imprisonment for any substantive offense be the same for all defendants irrespective of their economic status.

App. vii

"The State is not powerless to enforce judgments against those financially unable to pay a fine; indeed, a different result would amount to inverse discrimination since it would enable an indigent to avoid both the fine and imprisonment for nonpayment whereas other defendants must always suffer one or the other conviction."

We are not willing to hold under the facts of this case that a condition of sentence to be served on probation may not include the immediate payment of a fine. Such a sentence does not violate the due process and equal protection clause of the Fourteenth Amendment to the U. S. Constitution. On the contrary, to hold as urged by petitioner would result in inverse discrimination as to defendants under an identical sentence who were financially able to pay the fine immediately. In effect, the trial judge would be saying, "Since you are able to pay the fine, you must pay it all now; this is true, although those who can't pay it now may pay it later." Williams v. Illinois, supra.

There follow several reasons justifying the imposition of a lump-sum fine, without regard to the ability of the defendant to pay it immediately.

First, conclusions reached in Barnett v. Hopper, 548 F2d 550, supra, fail to take into account the fact that the ability

of a defendant to pay a fine is often a factor for the sentencing judge to consider in assessing the likelihood that the defendant will serve a term of probation without violation. Stated in another fashion, a conditionally probated sentence is not necessarily invidious discrimination based on wealth if the sentencing judge has determined that the defendant would not be a good candidate for probation unless a fine is paid first.

Second, the Supreme Court in the Williams-Morris-Tate trilogy emphasized the absence of the furtherance of any valid penal objective by the state statute in question that converted a fine into a term of imprisonment for failure to pay the fine. Tate v. Short, supra, 401 U. S. at 399; Williams v. Illinois, supra, 399 U. S. at 242. Probation, in contrast to a fine that only raises revenue, does indeed further the penal objectives of a state. The probationer is maintained under supervision which it is hoped is close until it is deemed that he can become a constructive member of society without such supervision.

Third, probation is an integral tool in the rehabilitation of the convicted felon. Many factors are present in determining whether the convicted felon should be released on probatic or parole. See Scarpa v. United States Board of Parole, 477 F2d

278, 281 (5th Cir. 1973). The decision to place the convicted felon on probation is therefore not one to be entered into lightly, especially if the defendant has been convicted of a serious crime such as burglary. The trial judge is vested with a wide discretion in sentencing matters in order that an appropriate punishment can be molded to fit "the countless variety of situations that appear." Williams v. Illinois, supra, 399 U. S. at p. 243.

Fourth, viewed from the perspective of the court below at the time of sentencing in this case, the sentence which resulted was quite reasonable, as well as appropriate to the circumstances of the particular case and the individual involved. Of critical significance is that the sentence imposed and the sentence challenged here was based on a representation that a fine could be paid by the person seeking probation.1/ It would be impossible now to reconstruct each of the considerations which entered into the judge's decision to place Ms. Hunter on probation on the condition that she pay a fine, but the fact that she assured the sentencing court that she could pay the fine had to be one of them.

1/ According to the appellant's brief, the following colloquy occurred just prior to sentencing: "Judge: Jacquelyn, are you able to pay a fine? Jacquelyn Evon Hunter: Yes. Judge: How can you pay a fine? Jacquelyn Evon Hunter: My . . . my cousin, Richardson . . . going to pay it." It further appears that Richardson was a school teacher and presumably able to pay the relatively small fine.

App. 2

Fifth, before a sentencing judge makes a decision to probate a sentence, he must determine whether the particular defendant is a good probation risk. Specifically, the judge must decide that the individual defendant is not likely to engage in a continuing course of criminal conduct and that the ends of justice and the welfare of society do not require that the defendant presently suffer the penalty imposed by law. It was the judge's determination in this case, on the basis of the representation made to him, that Ms. Hunter would be a good probation risk should she first pay the fine that was imposed. The fine aspect of the judgment simply does not place the appellant in a position where she is suffering disparate treatment based solely on wealth. On the issue of probation, the fine and ability to pay the fine provided assurances to the trial judge that the probation would be successful. A trial judge, upon receiving a representation that a family member is willing and able to pay the fine, knows that added control over the sentence is provided by the interest of the family and the belief of the family member that the defendant could successfully serve a perio of probation.

App. 21

Sixth, the payment of a fine places upon a given probationer a greater responsibility in successfully serving the period of probation than not paying a fine or paying a fine over the entire period of the sentence; if a breach of probation occurs, the fine money is lost and the only credit the defendant receives is that for the time spent on probation. Code Ann. § 27-2529 (Ga. L. 1957, p. 477; 1964, p. 496). Succinctly, the fine feature of the probationary sentence does not result in disparate treatment on the basis of wealth, but on acceptable considerations stemming from the fact that an accused has assured the sentencing court that a fine can and will be paid.

Seventh, a commitment by a trial court to impose a probated sentence in a serious crime must always be a close and difficult question; if a defendant's willingness to pay a fine is a factor which provides the court added assurance that the individual is a good risk for probation, the subsequent or later developed fact that the individual cannot pay the fine materially alters the original considerations which went into the judgment. In such a case, the judgment has already been made for the defendant -- if the fine cannot be paid, the defendant is not a good risk for probation and the sentence must be served.

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Eighth, if ability to pay can never be considered by the trial judge as a condition of probation when the defendant is relatively poor, in many cases the judge will no doubt be inclined to sentence the defendant to a term of imprisonment rather than a conditionally probated sentence. This result, urged by the appellant, does not bode well for the state and defendants, as a class, alike. Following the petitioner's contention may have an adverse effect on indigent defendants. It could encourage trial judges to impose straight jail sentences in order to ensure that the defendant receives some punishment and to avoid putting the court in the collection business with little likelihood of recovering time-payment fines from an indigent. That wealth may enable a defendant more easily to serve a term of probation successfully, is no doubt an advantage to the wealthy, but, with all other factors equal, if in a particular case the poor defendant is not a good candidate for probation because of a lack of funds, his imprisonment is simply not the result of invidious discrimination; his imprisonment is the result of his being a poor risk for probation.

Finally, it is clear from the appellant's brief, that the petitioner never claimed to be indigent, and unequivocally

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informed the court that she was able to pay a fine. It was on this basis that the court framed its sentence. Had the court been informed of the petitioner's claimed indigency and inability to pay a fine at the time of sentencing, the sentence might have been entirely different, i.e., a short sentence of incarceration, a longer sentence of probation, or the payment of the fine in periodic installments.

We do not think that a defendant should be able to mislead the court as to ability to pay a fine, thus inducing an alternate sentence, and later seek to rely upon constitutional safeguards to avoid punishment.

Judgment affirmed. All the Justices concur.

App. div

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

NO. 77-477

JOE S. HOPPER, WARDEN,
GEORGIA STATE PRISON,
Petitioner,

v.

TYRONE BARNETT,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITIONER'S REPLY BRIEF ON QUESTION OF MOOTNESS

Pursuant to the Court's request, Petitioner submits this Reply Brief on the issue of mootness in this case.

STATEMENT OF FACTS

While Respondent's case was pending in the lower federal courts,he was paroled from his sentence for armed robbery imposed in Liberty County, Georgia. Petition, Page 6, note 1; Response to Petition, Page 3, note 2. Subsequently, by order dated September 6, 1978, the Georgia Board of Pardons and Paroles discharged the Respondent from parole, with an effective date of September 1, 1978. Appendix A, Page A4.

During the pendency of Respondent's appeal to the Fifth Circuit, counsel for Petitioner Hopper, the Appellee in the Court of Appeals, had urged that the appeal be dismissed in that Court for mootness. Respondent Barnett opposed that motion on the ground that his status as a parolee precluded dismissal for mootness.[1]

[1] Counsel for Respondent has indicated to counsel for Petitioner Hopper that he now regards the case as moot, because of Respondent's discharge from parole.

ARGUMENT

RESPONDENT'S DISCHARGE FROM PAROLE RENDERS THIS CASE MOOT. CONSIDERATION OF COLLATERAL CONSEQUENCES FLOWING FROM THE CONVICTION DOES NOT PRECLUDE DISMISSAL FOR MOOTNESS IN THIS CASE, BECAUSE RESPONDENT DID NOT CHALLENGE THE UNDERLYING CONVICTION WHICH LED TO HIS CONFINEMENT.

In the typical habeas corpus context, neither release from custody nor discharge from parole will necessarily foreclose consideration of the merits of the case on the ground of mootness. Pennsylvania v. Mimms, 434 U.S. 106, 108 n. 3 (1977); Sibron v. New York, 392 U.S. 40, 53-57 (1968); Carafas v. LaVallee, 391 U.S. 234 (1968); Jones v. Cunningham, 371 U.S. 236 (1963). Respondent Barnett, however, did not challenge his sentence itself, but attacked the unconstitutionality of the imposition of a $2,000.00 fine as a condition of probation, after the fine was not paid and he had begun to serve his sentence. Because of his discharge from parole, Respondent could not at this point receive any benefit from the relief ordered by the Court of Appeals, which declared the sentence unconstitutional and directed that it be reformed in a manner consistent with the opinion. Barnett v. Hopper, 548 F.2d 550, 554 (5th Cir. 1977).

Respondent's case thus differs from those in which the collateral consequences of a sentence already served are sufficient to prevent a determination of mootness. See, e.g., Pennsylvania v. Mimms, supra; Ginsberg v. New York, 390 U.S. 629, 634 n.2 (1968);

Sibron v. New York, supra. Respondent's conviction was not to be set aside as a result of the lower court's decision, and he would thus not be able to remove the collateral legal consequences of the conviction.

Assuming arguendo that Respondent's case was not moot as long as he remained on parole, the subsequent discharge from parole and the restoration of civil and political rights and removal of disabilities resulting from the 1973 sentence renders this case moot. Cf., North Carolina v. Rice, 404 U.S. 244, 248 (1971). Georgia is not among the jurisdictions which distinguish between sentences imposed on probation and those served in confinement, for purposes of legal disabilities. See Huff v. Anderson, 212 Ga. 32(3)(1955).

CONCLUSION

Because Respondent's discharge from parole has rendered this case moot, this Court should vacate the lower court's judgment with appropriate direction. Scarpa v. U. S. Board of Parole, 414 U.S. 809 (1973); United States v. Munsingwear, Inc., 340 U. S. 36 (1950).

Respectfully submitted,

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DON A. LANGHAM
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APPENDIX "A"

State Board of Pardons and Paroles

JAMES T. MORRIS
Chairman

J. O. Parham Jr.
Member

Mrs. Mamie B. Ro...
Member

Floyd Buchee
Member

Mobley Howell
Member

ROOM 810
800 PEACHTREE STREET
ATLANTA, GEORGIA 30308

I, Donnie A Lee, Executive Officer for the State Board of Pardons and Paroles, do hereby certify that the attached and foregoing are true and correct copies of:

Parole Certificate effective September 24, 1976

Order of Discharge from Parole and Restoration of Civil and Political Rights effective September 1, 1978

for Tyrone F. Barnett D-14793, as appear of file and record in the offices of the State Board of Pardons and Paroles.

Donnie A Lee
Donnie A. Lee
Executive Officer

Sworn to and subscribed before
me this 14th day of November, 1978.

Paula L Powell
Notary Public
My Commission Expires September 29, 1979

State Board of Pardons and Paroles

ATLANTA, GEORGIA

Parole Certificate

KNOW ALL MEN BY THESE PRESENTS:

It having been made to appear to the Georgia State Board of Pardons and Paroles that

BARNETT, TYRONE F., Serial No. D-14793,

convicted of the following offense(s) in the court(s) indicated:

ARMED ROBBERY — LIBERTY COUNTY SUPERIOR COURT

is eligible to be PAROLED, and that there is a reasonable probability that said prisoner WILL REMAIN AT LIBERTY WITHOUT VIOLATING THE LAWS, and it being the opinion of the said State Board of Pardons and Paroles that the release of this prisoner is not incompatible with the welfare of society, and it appearing further that the Board is satisfied this prisoner will be suitably employed in self-sustaining employment or will not become a public charge on release:

It is therefore ORDERED that said prisoner be paroled effective ~~20th~~ day of ~~September~~, 19 ~~76~~ pending good behavior under supervision subject to the specific conditions of parole as listed on the reverse side of this Order, until the expiration of his maximum sentence, minus good time earned.

This parole shall not prevent the delivery of the prisoner to authorities of the Federal Government or any State otherwise entitled to his custody.

In witness whereof this Certificate bearing the Seal of the State Board of Pardons and Paroles is issued the ~~10th~~ day of September, 19 ~~76~~.

STATE BOARD OF PARDONS AND PAROLES
CECIL C. McCALL, CHAIRMAN
J. O. PARTAIN, JR., MEMBER
MRS. MAMIE B. REESE, MEMBER
JAMES T. MORRIS, MEMBER
FLOYD BUSBEE, MEMBER

FOR THE BOARD:

B. Young

B. YOUNG

Order No. 36,173

I will report immediately upon arrival of my [illegible] to my Parole Supervisor, either in person, by mail, telephone or personal visit, from any place within the State of Georgia.

Your Parole Supervisor's name and address:

[illegible] Tisdale, [illegible] Parole Officer
Adult Parole Supervision, Returns Building North
614 W. Street, N.W., Washington, D.C. 20001

2. I will, between the first and [illegible] day of each month, make a written report to my Parole Supervisor on the form provided for that purpose.

3. I will not change my residence or employment or leave the state without first getting permission from my Parole Supervisor. I also understand that should I fail to keep my Parole Supervisor informed as to my residence and employment my parole may be revoked and a warrant issued for my arrest.

4. I hereby waive all extradition rights and process and agree to return to Georgia from any State in the United States, its territories or the District of Columbia.

5. I will not use narcotic drugs in any form unless prescribed by a physician and I will not use intoxicating beverages to excess. I will not visit places of bad reputation where disorderly conduct may occur or which are frequented by persons of ill repute.

6. I will avoid injurious habits and I will not associate with persons of bad reputation or character.

7. I will not own, use, possess, sell or have under my control any type of deadly weapons or firearm.

8. I will not purchase or have interest in any type motor vehicle without first getting permission from my Parole Supervisor and I will not operate a motor vehicle without having a valid operator's permit.

9. I will not let my debts exceed $300.00 at any time, except where necessary for food and shelter, without first getting permission from my Parole Supervisor.

10. I will not be away from my residence of record between the hours of 12:00 midnight and 6:00 A.M. unless required to do so in connection with my employment.

11. I will conduct myself honorably in all respects, work diligently at a lawful occupation and support my dependents, if any, to the best of my ability.

12. I will not violate any law.

13. I will promptly and truthfully answer all inquiries of the State Board of Pardons and Paroles and its duly authorized representatives and carry out all instructions from them.

14. If it becomes necessary to communicate with my Parole Supervisor and he is not available, I will direct my communication to the Board's headquarters office at 800 Peachtree Street, 6th Floor, Atlanta, Georgia.

Parole Plan: Residence: Mother: Mrs. Sallie N. Barnett, 131 57th Place, S. E., Washington, D. C.

Employment: Family will assist.

SPECIAL CONDITIONS:

BEST COPY AVAILABLE

I hereby certify that this Statement of Conditions has been read and explained to the Parolee and he has agreed to them.

This 24 day of Sept, 19 76

Tyrone F Barnett
Parolee's Signature

Warden's Signature

(Give Full address where you can be reached)

Board of Pardons and Paroles

P. 005

ORDER OF DISCHARGE FROM PAROLE/CONDITIONAL RELEASE
And
RESTORATION OF CIVIL AND POLITICAL RIGHTS

Whereas, [redacted] whose Serial No. is [redacted], who, having committed the following offense(s)

OFFENSE	COURT OF CONVICTION	DATE OF SENTENCE	SENTENCE
ARMED ROBBERY	LIBERTY	5/4/73	10 yrs. (comp. from 4/10/73)

and having been paroled/conditionally released on SEPTEMBER 24, 1976, and having completed his (her) sentence(s) under the jurisdiction of the State Board of Pardons and Paroles or having successfully completed one year on conditional release; now, it is ORDERED that said parolee/conditional releasee be discharged from parole/conditional release on the sentence(s) listed above, the 1st day of SEPTEMBER, 1978.

THEREFORE, in compliance with the constitutional and statutory authority vested in this Board to remove disabilities imposed by law, it is hereby

ORDERED that time remaining to be served on the sentence(s) described above, if any, be commuted to present service on the above discharge date, and it is

ORDERED that all disabilities resulting from the above stated sentence(s) be removed on the above discharge date, and

ORDERED FURTHER that all civil and political rights lost as a result of the offense(s) be restored on the above discharge date.

It is directed that copies of this order be furnished to the said individual and to the Clerk(s) of the Superior Court(s) in the County(s) where the above sentence(s) were imposed.

GIVEN UNDER THE HAND AND SEAL of the State Board of Pardons and Paroles this 6th day of SEPTEMBER, 19 78

*The above order discharges from parole/conditional release only; it does not relieve from any time to be served on probation on the above or pending probation sentences. If the parolee/conditional releasee has any time remaining to be served on probation, he (she) must report at once to the proper probation agency.

STATE BOARD OF PARDONS AND PAROLES

Clemency Action Recorded
9/14/78 JC

James T. Morris, Chairman
J. O. Partain, Jr., Member
Mrs. Mamie B. Reese, Member
Floyd Busbee, Member
Mobley Howell, Member

Parole Order No. 38,173

cc: State Board of Corrections
Parole Supervisor DISTRICT OF COLUMBIA

CERTIFICATE OF SERVICE

I, G. Stephen Parker, Attorney of Record for the Petitioner herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that in accordance with the Rules of the Supreme Court of the United States, I served three copies of the foregoing Reply Brief on the Question of Mootness upon the Respondent by depositing same in a United States mailbox, with first class postage prepaid, addressed to counsel of record as follows:

Mr. James C. Bonner, Jr., Esq.
University of Georgia
School of Law
409 North Lumpkin Street
Athens, Georgia 30601

This 21st day of November, 1978.

G. Stephen Parker

G. STEPHEN PARKER